

Ye (Migration) [2018] AATA 2734 (29 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Naide Ye
CASE NUMBER:	1703244
DIBP REFERENCE(S):	bcc2015/3025554
MEMBER:	Russell Matheson
DATE:	29 June 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 29 June 2018 at 8:52am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Spouse of the sponsor – Marriage certificate – Joint accounts – Sound knowledge of financial affairs – Joint ownership of real estate – Household registration – Photographic evidence – Statements from third parties – Long term relationship – Decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 9 February 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 16 October 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant is the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 27 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor (wife), daughter and son in law of the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. Background

7. The applicant and sponsor were married in China on 17 October 1983 in Jinniu District, Chengdu City, China. There is one child from the relationship; a daughter born in 1984. The daughter has been living, studying and working in Australia since 2002. The sponsor migrated to Australia in April 2011 on a contributory parent visa.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spousal or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.

12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate indicating the parties registered their marriage in China on 17 October 1983 in Jinniu District, Chengdu City, China. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
15. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
16. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent, and overall credible. The Tribunal gave all the evidence provided by the parties and two witnesses at the Tribunal hearing and evidence provided by the applicant to the Department and Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
17. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spousal relationship met?

18. *Financial aspects*

19. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.

20. The parties provided documentary evidence of operating a joint account and personal accounts with HSBC Bank Australia. They stated that the joint account is utilised for their daily living expenses. The personal accounts of the applicant and sponsor are utilised as savings accounts and money is transferred from the applicant's personal account to the joint account when required. The parties told the Tribunal that they have AUD 100,000 in cash savings in China and property worth RMB 2,000,000. The parties told the Tribunal that they were employed by the government and are now receiving a pension due to retirement. The parties told the Tribunal that they always had personal accounts in China when they were working and always share their money. The parties stated that they are currently living with their daughter and son in law and they offer financial assistance to them in relation to the mortgage and daily living expenses and bills when needed.
21. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including: income, personal accounts, their joint account, the daily living expenses, bank loans and family mortgage repayments and payment of utility bills.
22. There is limited evidence before the Tribunal that the parties pool their financial resources. The parties have joint ownership of real estate in China and no other major assets or joint liabilities. There is no evidence of any one person in the relationship owing any legal obligation in respect of the other. Overall, on balance the Tribunal places moderate weight on this aspect of the relationship.

23. *Nature of the household*

24. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, if any, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together permanently in a partner relationship.
25. The parties provided documentary evidence of co-ownership of property in China dated 6 June 2013. The parties' oral evidence is that this co-ownership of the property continues to present. This documentary evidence was also provided to the Department at the time of the visa application. The Tribunal places some weight on the document. The parties provided documentation of co-habitation and household registration that shows the couple moving from no. 8, Unit 5, Building 2, Baishou Lane, Jinniu District, Chengdu City to No.402, 4/F Unit 2, Building 1 No.165, Yingbin Avenue, Jinniu District, Chengdu City on 30 May. The Tribunal places some weight on the document of the parties' co-habitation in China.
26. The parties stated that they are living with their daughter and son in law and grandchildren at Forestville in New South Wales. The couple gave detailed and consistent evidence about their living arrangements at their current residential address at Forestville and their living arrangements in China and communication during times of separation. They provided detailed and consistent evidence of their personal and family history, living arrangements and household responsibilities, travel and their daily routine and activities. They provided significant documentary and photographic evidence to the Tribunal of their life together. The parties gave detailed and consistent evidence of their care and support of their grandchildren, particularly for the eldest granddaughter who has autism. The parties' evidence was strongly supported by the two witnesses. The parties stated that they had notified government agencies that they were in a spousal relationship.
27. The Tribunal accepts that the parties live together and that they have established a joint household. The Tribunal accepts that they share the responsibility of the household duties.
- 28.

29. Social aspects

30. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

31. The applicant provided a significant amount of documentary and photographic evidence at the hearing to the Tribunal. The applicant provided photos of himself and the sponsor with each other, with friends and family on holidays and social activities with each other's friends and family. The Tribunal found the photographic evidence persuasive.
32. The Tribunal accepts that the relationship is socially recognised by family and friends. There are limited statements from third parties, including close family members, who express their view that the relationship is a genuine one and they state that they have regular contact with the applicant and sponsor. The Tribunal places some weight on the statements as they give convincing reasons as to why they believe the relationship to be genuine and give sound insight and knowledge of the parties' life together. The applicant also provided two detailed statements in relation to his long term relationship and marriage to the sponsor and their family life and history.
33. The Tribunal accepts that the relationship is socially recognised by family and friends. There are limited statements from third parties, including close family members, who express their view that the relationship is a genuine one. The Tribunal places significant weight on the social aspect of the relationship.

34. Commitment

35. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
36. The applicant and sponsor stated that they have known each other since 1980. The parties were married in October 1983. The Tribunal accepts that the parties are lawfully married. To date, the relationship has lasted for a period of time exceeding 38 years. The parties provided credible evidence of regular contact during times of separation. They supplied a significant amount of documentary and photographic evidence of their family history and lives together.
37. The parties and two witnesses provided detailed and consistent evidence of the parties' life together and as a family and their future together. The parties provided persuasive oral and documentary evidence of being in a genuine and continuing relationship.
38. The party's evidence is that they have been in a long term and committed relationship since 1980 and have cohabitated together since marrying in 1983. Their evidence is that they have maintained that relationship to the present time residing together in China as well living in Forestville with their daughter and son in law prior to lodging the visa application. They have three grandchildren they care for and support and they are currently living together with their family in the suburb of Forestville. The parties provided persuasive evidence of caring for and supporting their eldest grand-child, who has autism. The parties provided evidence of supporting each other during the times of loneliness and separation and during the loss of family members. The parties expressed their undying love for each other and expressed a desire to be living as a family unit in Australia.

39. Based on the evidence provided, the Tribunal accepts that the applicant and sponsor were in a genuine and continuing relationship and did not live separately and apart on a permanent basis at the time of application.
40. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.

41. Findings

42. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
43. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
44. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at time of application.
45. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
46. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
47. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

49. DECISION

50. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).